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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re D.M., et al., Persons
Coming Under the Juvenile
Court Law.

B290654

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Los Angeles County
Super. Ct. No. 18CCJP02040A-E

Plaintiff and Respondent,

v.

JENNIFER M.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles
County, Kim L. Nguyen, Judge. Reversed and remanded.

Elizabeth C. Alexander, under appointment by the Court of
Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Mother Jennifer M. (mother) appeals the dependency court's adjudication orders, asserting jurisdiction over her five children under Welfare and Institutions Code¹ section 300, subdivision (b), due to her daily marijuana use, and removing the children from her care and custody. We conclude the Department of Children and Family Services (Department) failed to demonstrate that mother's marijuana use resulted in any neglect or injury, or placed the children at risk for serious physical injury or illness in the future. We therefore reverse the court's jurisdiction and removal orders as to mother and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

Mother and O.P. (father) have five children, D.M. (10 years), J.M. (9 years), O.P. (7 years), A.P. (6 years), and S.P. (4 years).² The Department first became involved with this family in 2015, at which time the juvenile court found jurisdiction over the children under section 300, subdivisions (a) and (b), because both mother and father were abusing methamphetamine and

¹ All undesignated statutory references are to the Welfare and Institutions Code.

² We have listed the children's ages as of March 29, 2018, the date the petition was filed.

marijuana, father was physically aggressive with mother, and father used excessive discipline on one of the children. Mother successfully reunified with the children in 2017. Father failed to comply with court-ordered programs, including a substance abuse program. When the court terminated jurisdiction in January 2017, it gave mother sole legal and physical custody of the children. In addition, the court issued mother a restraining order against father, effective through October 15, 2018.

The Department received another referral concerning the children in March 2018, relating to mother's lack of stable housing, alleged use of marijuana in front of the children, and her contact with father, notwithstanding the restraining order that was still in effect. In the Department's detention report, mother's family (and specifically her mother, Maria) reported that after the court terminated jurisdiction over the children in 2017, mother had "done well" until father reappeared in January 2018. Around that time, mother had a dispute with Maria and moved out of her house with the children to a motel in order to be with father. The minors reported that while they were living at the motel, mother was providing food for them and they were attending school. They denied witnessing any domestic violence between mother and father, but said father screamed at mother and at them, and occasionally hit one of them with his shoe. The two older children also said they observed the parents using an apple to smoke marijuana outside their motel room.

In April 2018, the court detained the children and approved placement with the maternal grandmother, Maria, where they had been living previously with mother. The court allowed mother to reside in the home as well but ordered that mother's visitation with the children should be monitored. The court

ordered mother to abide by the restraining order prohibiting contact with father and to drug test weekly. The Department subsequently asked the court to prohibit mother from residing with Maria, at Maria's request, after mother arrived at Maria's home, appeared to be under the influence, and was verbally abusive to Maria.

In May 2018, the Department submitted its jurisdiction and disposition report to the court. Each of the children stated he or she was happy in the current placement at Maria's home. This time, however, the two older children denied witnessing any drug use by mother or father. Mother stated she had not used methamphetamine after the Department initiated its first case in 2015. She admitted using marijuana but pointed out that marijuana can now be purchased legally in California and stated she only smoked at night in order to help her sleep or if she spent time with friends while Maria watched the children. She also said that when she was staying in the motel with the children, she smoked only outside of their room and out of their view.

Maria and two of mother's sisters explained that mother had been doing well after the first dependency proceeding but mother's behavior changed when father reconnected with her in January 2018. At that point, Maria said, mother spent less time with the children and began spending time with father. She became less attentive to the children's needs and Maria said that on several occasions, she found mother and father passed out outside her home or nearby in father's car. And one of mother's sisters reported that one day when she went to pick up the children from school, mother was acting strangely and did not look well. When the sister tried to intervene and take the children home, mother took the children on a public bus and,

when confronted by the sister a short time later, made such a scene that the sister called police to intervene. Mother's brother observed that in February 2018, mother's personality began to change and she suffered from " 'mood swings' " and became "verbally aggressive with the rest of the family."

In its jurisdiction and disposition report, the Department categorized the family at a high risk level for future abuse or neglect because:

- The family has had prior DCFS investigations.
- The family has had a prior DCFS case.
- The current report is for neglect.
- The number of children in the home.
- Drug use by the primary caregiver.
- Criminal arrest history for the primary or secondary caregiver.

In addition, the Department alleged mother was neglecting the children by allowing father to have unlimited and unmonitored contact with the children, despite the existence of a restraining order and prior incidents of abuse by father. The Department conceded, however, that the parents had not engaged in any recent incidents of domestic violence.

The Department also suggested that "possible drug relapse" is a current concern for mother. The Department concluded that mother had used marijuana in front of the children. And the Department also stated that the frequency of mother's marijuana use, two to three times per day, is of concern because she has five children under the age of 10 to care for. But the Department presented no evidence of neglect; it simply surmised that

“mother’s frequent marijuana use potentially makes her incapable of providing regular and appropriate supervision and care of the children.”

Moreover, the Department expressed concern that father had not cooperated with the Department in the present case, and social workers were unable to conduct an interview with him to assess him. The Department also concluded that the children’s exposure to father had potentially subjected them to physical abuse.

On the basis of these facts, the Department urged that mother and father “engaged in a cycle of neglect that has not ceased even after a past court family reunification/maintenance case with the department.” And in light of the ongoing violation of the restraining order, the Department expressed concern that it “cannot ensure that the mother will be protective and follow through with the restraining order to continue to allow the father unmonitored access to the children.”

Shortly before the combined jurisdiction and disposition hearing, the Department submitted an ex parte application to the court requesting the court to change its prior order allowing mother to reside in Maria’s home with the children.

In June 2018, the court sustained the following jurisdictional allegation³ under section 300, subdivision (b):

“[Mother] has a history of substance abuse including methamphetamine, amphetamine and marijuana and is a current abuser of marijuana which renders the mother incapable of providing the children with regular care and supervision. On 3/23/18, the mother had a positive toxicology screen for marijuana. The children, [A.P. and S.P.] are of such a young age as to require constant care and supervision and the mother’s substance abuse interferes with providing regular care and supervision of the children. The children were prior dependents of the Juvenile Court due to the mother’s substance abuse. The mother’s substance abuse endangers the children’s physical health and safety and places the children at risk of serious physical harm, damage and danger.”

Further, the court ordered the children removed from both parents with reunification services for mother. Mother’s case plan requires a full rehabilitation program with aftercare, weekly

³ The court sustained a similar allegation as to father: “[Father] has a history of substance abuse including cocaine, methamphetamine, amphetamine and marijuana and is a current abuser of marijuana which renders the father incapable of providing the children with regular care and supervision. The children, [A.P. and S.P.] are of such a young age as to require constant care and supervision and the father’s substance abuse interferes with providing regular care and supervision of the children. The children were prior dependents of the Juvenile Court due to the father’s substance abuse. The father failed to reunify with the children due to his non-compliance with the Court ordered services. The father’s substance abuse endangers the children’s physical health and safety and places the children at risk of serious physical harm, damage and danger.” Father has not challenged the allegation against him in this appeal.

random or on demand drug testing, and participation in a 12-step program and individual counseling. Mother appeals.

DISCUSSION

Mother contends no substantial evidence supports the juvenile court's jurisdictional finding. Further, even if the jurisdictional finding is affirmed, she argues the removal order should be reversed.

1. The merits of mother's appeal should be addressed.

Although neither party addresses whether this appeal presents a justiciable controversy, we note that even if we reverse the jurisdictional finding as to mother, the unchallenged jurisdictional finding as to father will continue to support dependency jurisdiction pursuant to section 300, subdivision (b). (See *In re Drake M.* (2012) 211 Cal.App.4th 754, 762–763; *In re M.W.* (2015) 238 Cal.App.4th 1444, 1452.)

“ ‘When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the [trial] court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence.’ [Citation.] However, we generally will exercise our discretion and reach the merits of a challenge to any jurisdictional finding when the finding (1) serves as the basis for dispositional orders that are also challenged on appeal [citation]; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citations]; or (3) ‘could have other

consequences for [the appellant], beyond jurisdiction’ [citation].” (*In re Drake M.*, *supra*, 211 Cal.App.4th at pp. 762–763; *In re M.W.*, *supra*, 238 Cal.App.4th at p. 1452.)

We conclude that merits review is warranted here. The finding that mother is unable to care for her children due to her use of marijuana could potentially impact the current or future dependency proceedings. Further, that finding served as the sole basis for the court’s decision to remove the children from her, which places mother on the path to termination of parental rights. Finally, “refusal to address ... jurisdictional errors on appeal ... has the undesirable result of insulating erroneous or arbitrary rulings from review.” (*In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1548; *In re M.W.*, *supra*, 238 Cal.App.4th at p. 1452.) For these important reasons, we review mother’s appeal on the merits.

2. Standard of Review

We review jurisdictional and dispositional orders for substantial evidence. (*In re D.C.* (2015) 243 Cal.App.4th 41, 55.) In doing so, we view the record in the light most favorable to the juvenile court’s determinations, drawing all reasonable inferences from the evidence to support the court’s findings and orders. Issues of fact and credibility are the province of the court and we neither reweigh the evidence nor exercise our independent judgment. (*In re I.J.* (2013) 56 Cal.4th 766, 773.) But substantial evidence “is not synonymous with any evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] ... ‘The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.’ [Citation.]” (*In re*

Savannah M. (2005) 131 Cal.App.4th 1387, 1393–1394, italics omitted; *In re Yolanda L.* (2017) 7 Cal.App.5th 987, 992.)

3. Jurisdiction

Section 300, subdivision (b)(1), authorizes a juvenile court to exercise dependency jurisdiction over a child if the “child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent ... to adequately supervise or protect the child[,] ... or by the inability of the parent ... to provide regular care for the child due to the parent’s ... mental illness, developmental disability, or substance abuse.” (§ 300, subd. (b)(1).) A jurisdictional finding under section 300, subdivision (b)(1), requires the Department to demonstrate by a preponderance of the evidence: (1) neglectful conduct, or the failure or inability of the parent to adequately supervise or protect the child; (2) causation; and (3) serious physical harm or illness or a substantial risk of serious physical harm or illness. (*In re L.W.* (Feb. 7, 2019, No. B290992) __ Cal.App.5th __ [2019 WL 493960, *4]; *In re Joaquin C.* (2017) 15 Cal.App.5th 537, 561; see also *In re R.T.* (2017) 3 Cal.5th 622, 624.)

Here, the Department alleged that mother’s daily marijuana use rendered her unable to provide appropriate care for the children. Mother concedes she uses marijuana several times a day—usually at night to help her sleep—but contends the Department failed to show the children suffered any past harm or illness or were at a substantial risk of future harm or illness due specifically to her marijuana use. We agree with mother.

As a general matter, the legislature has declared, “The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection

and physical and emotional well-being of the child.” (§ 300.2.) And our courts have repeatedly held that a juvenile court “need not wait until a child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child.” (*In re R.V.* (2012) 208 Cal.App.4th 837, 843.) But as already noted, under section 300, subdivision (b), state intervention is not warranted unless a parent has neglected his or her child due to one of the enumerated factors, such as drug use, or there is a substantial risk of harm in the future. Accordingly, we have held that a parent’s use of marijuana, standing alone, does not generally provide a sufficient basis for dependency jurisdiction. (See, e.g., *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 728 (*Rebecca C.*) [substance abuse without more is insufficient to support jurisdiction]; *In re Drake M.*, *supra*, 211 Cal.App.4th at p. 769 [drug use without evidence that use has caused or will cause physical harm insufficient to support jurisdiction]; *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1336–1338 [Department opined that mother’s use of alcohol and marijuana did not establish substance abuse].)

Our colleagues in Division Eight of this district recently explained why a parent’s drug use does not, in and of itself, justify the assertion of dependency jurisdiction over a child. (*In re L.W.*, *supra*, __ Cal.App.5th __ [2019 WL 493960 at p. *5].) The court discussed *Rebecca C.*, *supra*, 228 Cal.App.4th 720, in which the Department responded to a referral and its initial investigation “found nothing other than mother’s lengthy and current drug abuse and Rebecca’s below grade level or nonexistent school performance. [Citation.] Mother had a lengthy history of drug use since her teenage years and currently used methamphetamine, which she alternately denied and admitted.

[Citation.] She tested positive for methamphetamine, amphetamine, and marijuana on the day the social workers responded to the referral. [Citation.] She had been involved in the criminal court dependency court systems in the past as a result of her drug use. [Citation.] She had previously enrolled in a drug program and relapsed. [Citation.] She rationalized her drug use as being due to the stress she was feeling as she had recently separated from Rebecca's father and their son was charged with murder. [Citation.] She failed to monitor whether Rebecca was doing her homework. [Citation.]

“After rejecting the argument that failure to monitor homework presents a risk of physical harm, the court addressed the sole remaining basis for asserting jurisdiction—mother's substance abuse. [Citation.] ‘DCFS next argues that methamphetamine, amphetamine and marijuana are well recognized to be substances which cause hallucinogenic or stimulant-driven behavior. DCFS argues that “[t]he risk to a child being cared for by a parent under the influence of such substances is not speculative.” We do not accept DCFS's argument. It excises out of the dependency statutes the elements of causation and harm. In other words, DCFS essentially argues that, when a parent engages in substance abuse, dependency court jurisdiction is proper. This is not what the dependency law provides. Further, if DCFS's position were accepted, it would essentially mean that physical harm to a child is *presumed* from a parent's substance abuse under the dependency statutes, and that it is a parent's burden to prove a negative, i.e., the *absence* of harm. Again, this is not what the dependency law provides.’ [Citation.]” (*In re L.W.*, *supra*, __ Cal.App.5th __ [2019 WL 493960 at pp. *15–16].)

As already noted, at the time the Department received the initial referral in this case, mother and father were living in a motel with the children. Mother was providing the children with sufficient food and they were attending school on a regular basis. And the children reported they were generally treated well, though mother and father would sometimes yell at them and father sometimes hit the children with a shoe. In terms of marijuana use, mother stated she generally used marijuana at night to help her sleep (and while the children were presumably sleeping) or while she was out with friends and the children were in the care of Maria.

Notably, the Department introduced no evidence that the children suffered “serious physical harm or illness” in the past resulting from mother’s marijuana use specifically, as required under section 300, subdivision (b). Mother and the children all stated mother never smoked anything in the presence of the children. And although the two older children may have observed mother and father smoking marijuana outside the motel room on at least one occasion, we conclude that incident alone was not sufficiently serious or harmful to support the true finding on the jurisdictional allegation against mother. In terms of any future risk of harm, it is true that mother’s marijuana use continued after the court detained the children and the record includes mother’s drug test results. But the Department did not put those test results into any context which would support an inference that the levels of cannabinoids in mother’s system would necessarily have rendered her unable to care for the children.

It appears that the Department and the court—and indeed, mother’s family—were all concerned about the negative influence father might have on mother. By all accounts, mother stayed on

track after reunifying with the children in 2017. She got a job, tended to the children, and paid rent and a share of expenses while living with Maria and other extended family members. And there is no evidence mother relapsed and resumed using methamphetamine. But after father reasserted himself in January 2018, mother and father violated the domestic violence restraining order against father, and mother allowed father to have unmonitored access to the children.⁴ Mother started spending time with father and as a consequence spent less time with the children and seeing to their care. The children indicated that father sometimes screamed at them and would hit them with his shoe when he was angry. Further, given that father and mother had used methamphetamine together in the past, the concern that she might relapse was not without foundation. Indeed, Maria had already observed some troubling behavior, as she had seen mother and father “passed out” in father’s car.

The Department, however, did not ask the court to find jurisdiction due to mother’s failure to protect the children from father. As it stands, the jurisdictional finding found true by the court involving mother relates only to mother’s marijuana use. And her case plan is focused primarily on reducing or eliminating drug use, and her progress toward reunification (and away from termination of parental rights) will be measured in relation to these predicates. In the absence of evidence that mother’s *drug use* resulted in or placed the children at a substantial risk of physical harm—at least as of the time of the adjudication—we cannot affirm the court’s jurisdictional order as to mother. Given

⁴ The terms of the restraining order are not revealed by the appellate record.

the passage of time, however, nothing in this opinion should be read to limit the Department's ability to assert new jurisdictional allegations on remand.

DISPOSITION

The orders regarding jurisdiction and disposition as to mother are reversed. The matter is remanded for further proceedings consistent with this opinion.

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LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.